IP & the European Court of Human Rights

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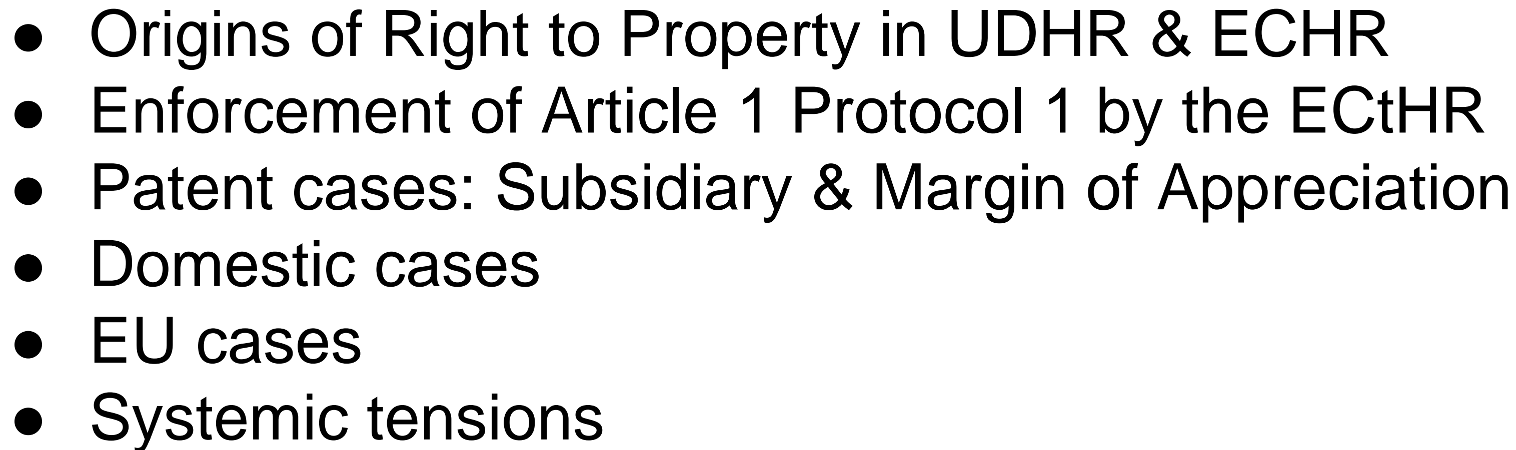

● Origins of Right to Property in UDHR & ECHR
● Enforcement of Article 1 Protocol 1 by the ECtHR
● Patent cases: Subsidiary & Margin of Appreciation
● Domestic cases
● EU cases
● Systemic tensions

UDHR & ECHR

Article 17 UDHR

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 1 Protocol 1 ECHR

1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

‘**possessions**’ Includes but is not limited to right to property: Marckx v Belgium (1979) 2 EHRR 330

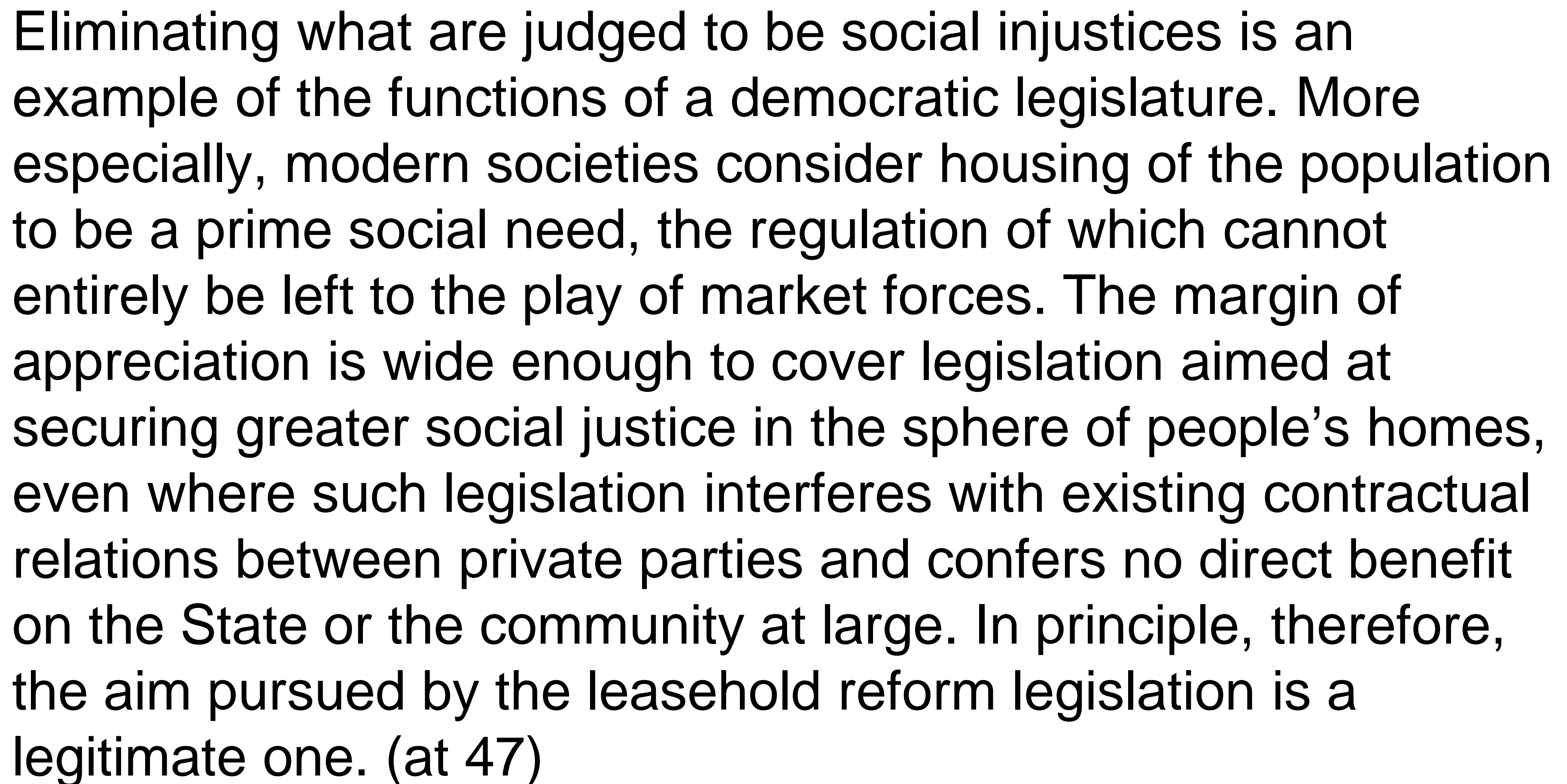
e.g. **Company shares:** Bramelid & Malmstrom v Sweden, (1982) 29 DR 64.

e.g. **Patents**: Smith Kline and French Laboratories Ltd v The Netherlands (1990) 66 DR 70

James v United Kingdom [1986] ECHR 2

“Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest"

Furthermore, the notion of "public interest" is necessarily extensive… the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation.” at 46



Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large. In principle, therefore, the aim pursued by the leasehold reform legislation is a legitimate one. (at 47)

Smith Kline & French Laboratories Ltd v The Netherlands (1990) 66 DR 7

The Commission recalls that the exclusive rights of a patentee are limited in many of the Contracting States and that provision for other persons to make use of a particular patented product or process is commonly made for the purpose of preventing the long term hampering of technological progress and economic activity…. The Commission notes that Centrafarm was granted a compulsory licence under the applicant's patent since, otherwise, it could not work under another patent which it held…

The Commission is satisfied that the grant of the compulsory licence was lawful and pursued a legitimate aim of encouraging technological and economic development.

- EU Directive on Biotechnological Inventions (1998)

Netherlands v. Parliament and Council [2001], C-377/98

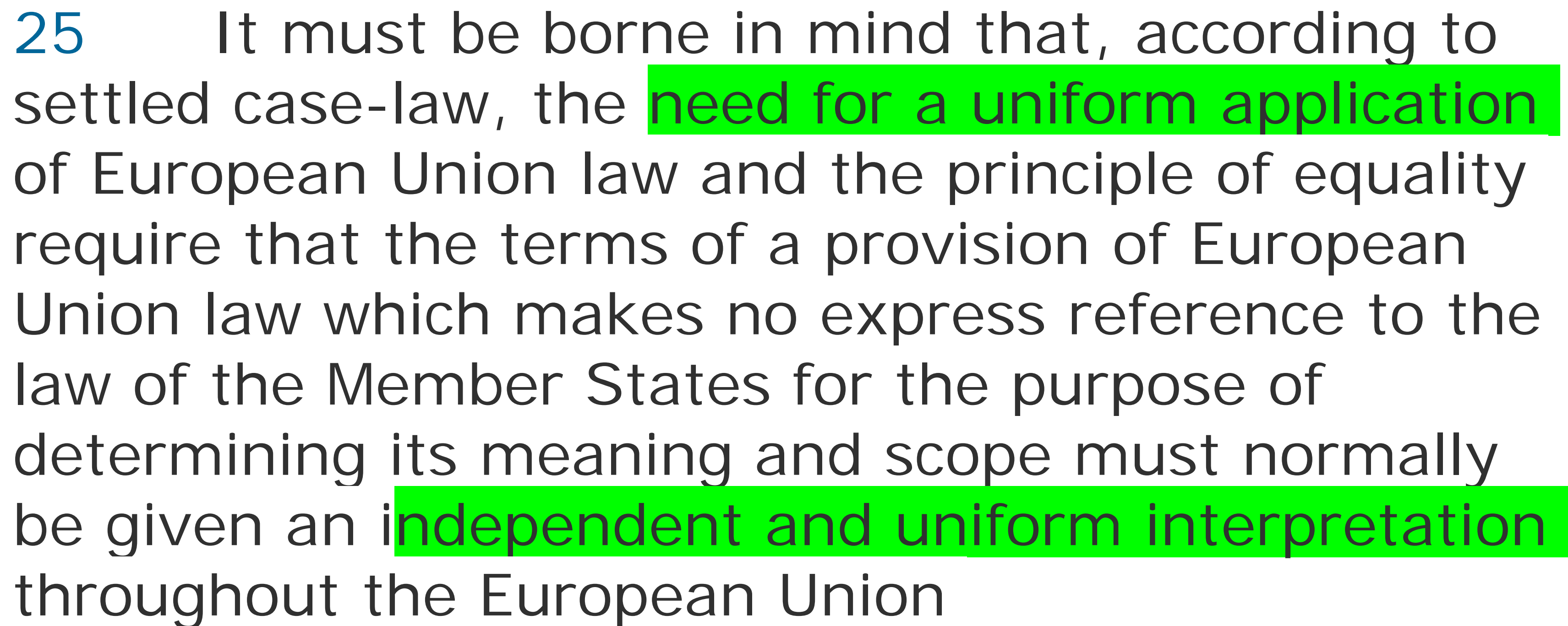
Brüstle v. Greenpeace [2011], C-34/10

‘1. The human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions.

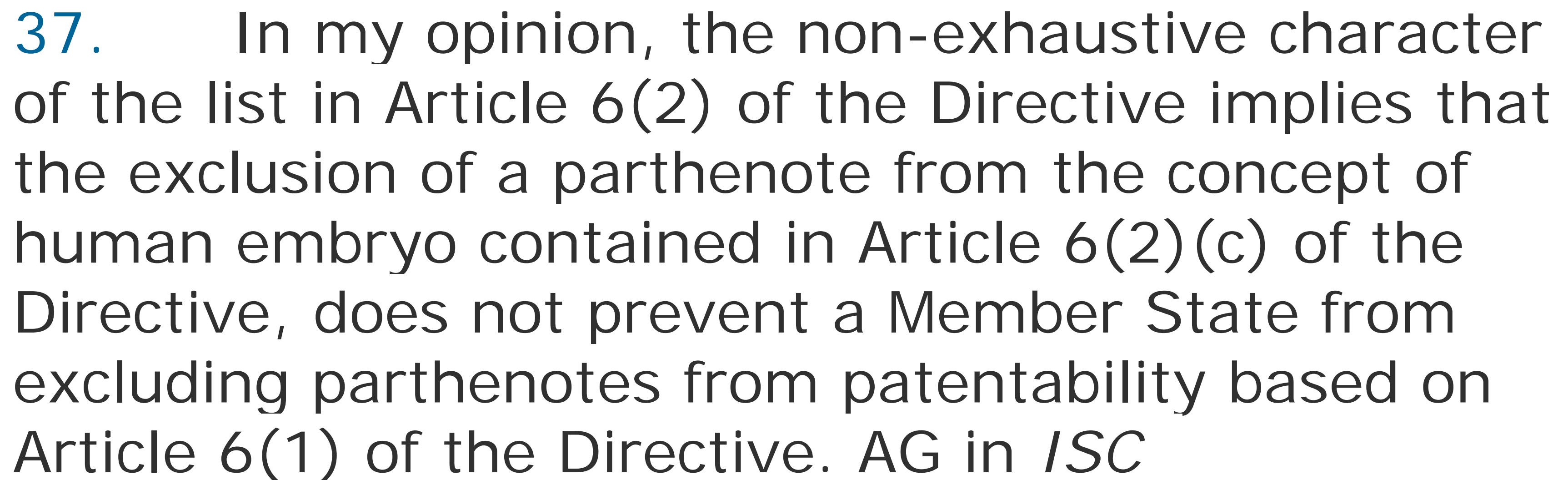
2. An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element.’

Aims of the EU Directive on Biotechnological Inventions

"… the aim of the Directive. It follows from recitals 3 and 5 to 7 in the preamble to the Directive that it seeks, by a harmonisation of the rules for the legal protection of biotechnological inventions, to remove obstacles to trade and to the smooth functioning of the internal market that are brought about by differences in national legislation and case-law between the Member States, and thus, to encourage industrial research and development in the field of genetic engineering (see, to that effect, *Netherlands* v *Parliament and Council*, paragraphs 16 and 27"
Grand Chamber CJEU in *Brustle*



25 It must be borne in mind that, according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union



37. In my opinion, the non-exhaustive character of the list in Article 6(2) of the Directive implies that the exclusion of a parthenote from the concept of human embryo contained in Article 6(2)(c) of the Directive, does not prevent a Member State from excluding parthenotes from patentability based on Article 6(1) of the Directive. AG in *ISC*

Scenarios for the Future

- Patentability of isolated genes and cells and Human Rights (Myriad type exclusions)?
- Uniformity of moral exclusions?

Thank You